

**COURT OF APPEALS
DECISION
DATED AND FILED**

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

September 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0519

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IRA LEE ANDERSON-EL II,

PLAINTIFF-APPELLANT,

v.

AVE M. BIE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

DEININGER, J.¹ Ira Anderson, an inmate at Kettle Moraine Correctional Institution (KMCI), appeals a judgment dismissing his small claims action against Ave Bie, a Department of Corrections (DOC) official. Anderson

¹ This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

claims the trial court erred in granting Bie's motion to dismiss. We disagree and affirm the judgment.

Anderson commenced this action seeking to collect \$750 from Bie on the following allegations:

I have been working in the maintenance dept. at KMCI since 7-30-96, and have not been compensated for my work performance in accordance with § DOC 309.55(5)(a) [&] (b), and when I filed an inmate complaint about it, the defendant dismissed it.

Bie moved to dismiss the complaint on the grounds that Anderson had not complied with the notice of claim statute, § 893.82, STATS.; that Bie was "protected from suit by the doctrines of sovereign immunity and public officer immunity"; and that Anderson had failed to state a cause of action upon which relief can be granted. After a court commissioner dismissed his complaint, Anderson requested a trial de novo in the circuit court. *See* § 799.207(3), STATS.

The circuit court then granted Bie's motion to dismiss. In a written order, the court noted that the defense motion was grounded on a lack of personal jurisdiction and on "discretionary immunity grounds." The order does not specify, however, the grounds upon which the court granted Bie's dismissal motion, referring instead to the court's oral ruling on the motion. The court entered judgment in Bie's favor for \$50 in statutory costs, and Anderson appeals. Anderson filed a statement on transcript, *see* RULE 809.11(4), STATS., indicating that a transcript "is not necessary for the prosecution of this appeal."

In his brief, Anderson asserts that the trial court "stated that this was a discretionary decision made by [Bie]...." The decision referred to is apparently the "Secretary's Decision on Inmate Complaint," which Bie signed as the DOC

Secretary's designee, a copy of which is contained in the record. That decision dismissed Anderson's complaint regarding being underpaid for his work at KMCI. It would thus appear that the trial court's granting of Bie's motion was based, at least in part, on the doctrine of "public officer immunity," which immunizes public officials and employees from personal liability for discretionary acts performed within the scope of their public duties. *See C.L. v. Olson*, 143 Wis.2d 701, 710, 422 N.W.2d 614, 617 (1988).

Bie argues that we should summarily affirm because of Anderson's failure to produce a transcript of the trial court's decision on her dismissal motion, a failure which "deprives this court of the grounds or reasoning of the trial court for dismissal." We decline to affirm on that basis. It is apparent from the record that the trial court dismissed Anderson's complaint either for lack of personal jurisdiction over Bie, or because it concluded that she was entitled to public officer immunity for a discretionary act. Anderson asserts that it was the latter, and we will thus address the correctness of a dismissal on that basis.² Whether a trial court properly granted a motion to dismiss is a question of law which we decide de novo. *See Hermann v. Town of Delavan*, 215 Wis.2d 370, 378, 572 N.W.2d 855, 857 (1998). While a transcript of the trial court's reasoning would be of assistance to us in our review, its absence from the record is not fatal to Anderson's appeal.

It is apparent from Anderson's submission in response to Bie's motion that Bie's only role in this pay dispute was her action in affirming, on

² Anderson makes no argument regarding the issue of the court's personal jurisdiction over Bie; to the contrary, he asserts that the trial court decided this issue in his favor. Given that we conclude the complaint was properly dismissed on the basis of Bie's immunity as a public official, we do not address whether the trial court lacked personal jurisdiction over Bie.

behalf of the DOC Secretary, the dismissal of the complaint Anderson lodged via the Inmate Complaint Review System (ICRS). *See* WIS. ADM. CODE Ch. DOC 310. Under ICRS, if an inmate is dissatisfied with action taken on a complaint by personnel at his or her institution, an appeal may be taken to the “Corrections Complaint Examiner” (CCE), whose recommendation, in turn, is reviewed by the DOC Secretary, or the secretary’s designee. *See* WIS. ADM. CODE §§ DOC 310.13, 310.14, & 310.03(16).

The CCE recommended that Anderson’s pay complaint be dismissed because an investigation revealed that there were no positions available in Anderson’s assigned work area at the pay rating to which he claimed entitlement. The applicable rule directs the DOC Secretary, or his or her designee, to proceed as follows upon receipt of the CCE’s recommendation:

The secretary may do any of the following:

- (a) Accept the recommendation of the CCE and adopt it as the decision;
- (b) Adopt the recommendation of the CCE with modifications;
- (c) Reject the recommendation of the CCE and make a decision;
- (d) Return the recommendation to the CCE for further investigation.

WIS. ADM. CODE § DOC 310.14(2).

Thus, the rule quoted above establishes that the secretary’s (or designee’s) action on an inmate complaint involves the exercise of discretion. It is not the type of action that falls within exceptions to public officer immunity for “ministerial” acts, or for non-governmental decision-making:

In sum, exception to the general rule of public officer immunity exists where the public officer’s or employee’s duty is absolute, certain and imperative, involving merely the performance of a

specific task and (1) the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for the exercise of judgment or discretion, ... or (2) there exists a known present danger of such force that the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion.... Additionally, the doctrine of immunity may be inapplicable where a public officer's challenged decision involves the exercise of discretion but the discretion exercised is not governmental, i.e., does not require the application of statutes to facts nor a subjective evaluation of the law.

C.L. v. Olson, 143 Wis.2d 701, 717-18, 422 N.W.2d 614, 620 (1988) (citations and footnote omitted).

Anderson argues that Bie's action in accepting the CCE's recommendation of dismissal "is not discretionary in nature or intent" because other rules direct how the pay of inmates of Wisconsin correctional institutions is to be determined. Although it appears that the application of the inmate pay rules may also involve the exercise of discretion, we need not determine whether the KMCI officials who allegedly underpaid Anderson for his work were performing ministerial or discretionary acts, because they have not been sued by Anderson. The only defendant Anderson named was Bie, and she was clearly acting for the DOC Secretary under WIS. ADM. CODE § DOC 310.14. In so doing, she performed a discretionary act.

In a nutshell, Anderson seeks to collect the back pay he claims the DOC owes him from Bie personally, although her only connection with the pay dispute is her action as the DOC Secretary's designee in accepting the CCE's recommendation to dismiss Anderson's ICRS complaint. In taking that action, Bie was called upon to consider the merits of Anderson's complaint in light of the CCE's investigation and recommendation. Bie exercised her discretion in her capacity as a public officer, and she is therefore immune from personal liability for her action. The trial court did not err in dismissing Anderson's complaint.

In closing we note that although Bie enjoys immunity from personal liability, her discretionary action in denying Anderson the relief he requested in his inmate complaint is not immune from judicial review. The proper way for Anderson to have obtained that review, however, is by filing for certiorari review of the administrative action denying his ICRS complaint. That would bring the record of the administrative proceedings on his complaint before a court, and could result in an order directing the DOC to grant Anderson the relief he requested via the ICRS. *Cf. State ex rel. Braun v. Krenke*, 146 Wis.2d 31, 429 N.W.2d 114 (Ct. App. 1988).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

